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SUBJECT: Vietnam: BTA Joint Committee Review

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11. (SBU) Summary and Introduction: DAUSTR Elena Bryan led the U.S. delegation and Nguyen Thu Do, Deputy Director, Office of the Government, led the GVN side at the expert-level meeting of the Bilateral Trade Agreement (BTA) Joint Committee in Hanoi April 11-12. Other USG participants in the Joint Committee meetings included USPTO Attorney-Advisor Jennifer Ness, U.S. Copyright Office Policy Planning Advisor Steven Tepp, Econoffs from Hanoi and HCMC and Econ Assistant. The GVN participants included representatives from the Ministries of Trade (MOT), Finance (MOF), Planning and Investment (MPI), Culture and Information (MOCI), Justice (MOJ), Science and Technology (MOST), Public Security (MPS), Labor, Invalids and Social Affairs (MOLISA), Agriculture and Rural Development (MARD), Fisheries (MOFI), Post and Telematics (MPT), Industry (MOI), Foreign Affairs (MOFA) and the State Bank of Vietnam (SBV). The two sides thoroughly reviewed the status of Vietnam's implementation of all BTA obligations. Vietnam provided the U.S. delegation with an article-by-article summary of its implementation efforts. The two sides agreed to prepare a chart summarizing BTA implementation in advance of the BTA Joint Committee at the vice minister level (date to be determined.) This cable summarizes the Joint Committee's review of the BTA. End Summary and Introduction.

Chapter 1: Trade In Goods

12. (SBU) ARTICLE 1/MOST FAVORED NATION (MFN) TREATMENT. The GVN implemented this obligation through promulgation of a 2002 Ordinance on MFN and national treatment.

13. (SBU)ARTICLE 2/TECHNICAL AND SANITARY AND PHYTO-SANITARY STANDARDS. The U.S. delegation noted it has received multiple complaints from U.S. companies about problematic regulations and lack of transparency in these areas. One example is a Ministry of Health (MOH) requirement that importers of wine and spirits provide two bottles (of each kind of product imported) for "testing" purposes each time a shipment arrives in Vietnam. The U.S. side noted that while the USG supports Vietnam's right to ensure that imports do not endanger health and safety, regulations in this area need to be reasonable. The Vietnamese delegation asked for more information in writing and promised to convey U.S. concerns to the MOH.

14. (SBU) ARTICLE 2/TRADING RIGHTS: Vietnam is obligated to liberalize trading rights over a three to six year period. Beginning in December 2004, Vietnam was required to allow U.S. companies with capital invested in production and manufacturing to engage in trading rights and to allow U.S. companies to engage in joint ventures in trading activities. The U.S. delegation noted that this is a fundamental obligation, but the GVN has not implemented the necessary regulations. The Vietnamese delegation said the GVN is in the process of drafting the regulations. (Note: the GVN side was not sure if the revisions will be included in the revisions to the Commercial Law (slated for approval by the National Assembly in May) or in a separate Government Decree. End Note.) The GVN estimated it will complete the regulations by the end of 2005. The U.S. delegation emphasized that this obligation is overdue. The lack of action on the part of the GVN has resulted in U.S. companies being denied their rights under the BTA. GVN Customs' officials have refused to allow companies to import products that fall outside the parameters of their investment licenses. The U.S. side requested, as an interim measure, that the GVN issue an instruction to the General Department of Customs to allow U.S. companies to exercise their rights.

15. (SBU) ARTICLE 3/CUSTOMS VALUATION: Vietnam was obligated to implement WTO level standards for customs valuation by December 2003. A June 2002 Decree and a December 2003 Circular established the legal framework for customs

valuation. A March 2004 Official Letter eliminated the use of minimum prices on all remaining commodities.

16. (SBU) ANNEX A/ELIMINATION OF NATIONAL TREATMENT
EXCEPTIONS: Vietnam agreed to eliminate national treatment (NT) exceptions for 1) the special consumption tax (SCT) on vehicles (under twelve seats) and inputs to produce cigarettes as well as for 2) the supplemental tax on fuels, metals and fertilizers. The GVN has eliminated the NT exception for the supplemental taxes. However, obligations related to the SCT have not been implemented. The GVN delegation noted that the MOF is drafting language to be included in the revised SCT Law that would set uniform SCT rates for inputs to cigarette/cigar production. The National Assembly is scheduled to approve this law in October. On autos, the GVN delegation said the GVN plans to phase out the NT exceptions on the auto SCT upon accession to the WTO. The U.S. delegation reminded the GVN that the two sides have been discussing the auto SCT since 2002 and that the current GVN "roadmap" for the auto sector has resulted in significant increases in the SCT and endangered U.S. investment in the auto sector in Vietnam. The U.S. delegation emphasized USG interest in seeing the make its auto roadmap public, and adopt a "reasonable" level of SCT.

17. (SBU) ANNEX B1/QUANTITATIVE RESTRICTIONS. The GVN is obligated to phase out quantitative restrictions (QRs) on a variety of agricultural and industrial imports over a period of three to ten years. The GVN has phased QRs on all products except sugar. Annex B1 does not require the removal of the QR on sugar until December 2011.

18. (SBU) ANNEX E/TARIFF REDUCTIONS: Vietnam was obligated to reduce tariffs on a broad range of goods by one-third to one-half no later than December 2004 (December 2007 for a few products.) The Ministry of Finance implemented this obligation through promulgation of an Ordinance in November 2004.

Chapter 2: Intellectual Property Rights

19. (SBU) ARTICLE 1/INTERNATIONAL CONVENTIONS: Vietnam is obliged to join several international IPR conventions "promptly." The GVN delegation confirmed that Vietnam has been a member of the Paris Convention since 1949 and became a member of the Berne Convention (copyright) in October 2004. Vietnam is not yet a member of the Geneva Convention (Phonograms), the International Convention for the Protection of New Varieties of Plants (UPOV) or the Brussels Convention (Satellite Signals). The MOCI has submitted proposals to join the Geneva Convention and the Brussels Convention to the President for approval and expects to finalize this process by the end of 2005. The MARD is currently circulating for comments a draft proposal to join UPOV.

110. (SBU) ARTICLE 3/NATIONAL TREATMENT FOR FEES AND CHARGES. The GVN delegation confirmed that in December 2004 Vietnam established a uniform level of IPR fees and charges applicable to both foreign and domestic entities.

111. (SBU) ARTICLE 4/COPYRIGHT AND RELATED RIGHTS. The GVN delegation confirmed that Vietnam has not fully implemented its obligations related to copyright protection, but emphasized that the new IPR Law scheduled to be approved by the National Assembly in October will address outstanding copyright issues. Additionally, the MOCI has set up a committee to begin drafting optical disc regulations, which MOCI hopes to finalize by the end of 2005.

112. (SBU) ARTICLE 5/SATELLITE SIGNALS: The GVN delegation noted that Vietnam's Civil Code provides some protection for satellite signals, but confirmed that Vietnam has not fully implemented its obligation in this area. The MOCI has incorporated provisions pertaining to protection for satellite signals in the draft IPR Law.

113. (SBU) ARTICLE 6 AND 7/PATENTS AND TRADEMARKS: The GVN delegation confirmed that Vietnam has not fully implemented its obligations related to the protection of patents and trademarks. The GVN has not yet codified the certification of trademarks in law or revised the procedures for patent disputes (moving the burden of proof from the plaintiff to the defendant). The new comprehensive IPR Law will address these issues, but the GVN will need to promulgate additional implementing regulations to fully meet BTA and WTO obligations in these areas. The National Office of Intellectual Property (NOIP) has started work on the implementing regulations.

114. (SBU) ARTICLE 9/TRADE SECRETS AND DATA EXCLUSIVITY. The GVN delegation confirmed that the 2002 Decree (54) that deals with trade secrets does not fully address BTA requirements with respect to either trade secrets or data exclusivity (protection of test data). The new IPR Law will

fully implement Vietnam's obligations related to data exclusivity and pharmaceutical management agencies will be able to apply the provisions as soon as the law is approved. The IPR law will also address trade secrets, but will require passage of subsequent implementing regulations in order to comply fully with BTA and WTO obligations in this area.

¶15. (SB) ARTICLE 11/ENFORCEMENT: The U.S. delegation asked what plans the GVN has to upgrade the existing Criminal Code (from 2000) to improve enforcement of IPR. The GVN noted that the new IPR Law will criminalize the commercial scale production of counterfeit and pirated goods. This is the first time the GVN has considered including language on criminal penalties in an economic law. The U.S. delegation emphasized that the USG views enforcement of IPR very seriously. The best way to combat IPR violations is strong enforcement, including significant civil and criminal penalties, large fines and jail sentences. The U.S. delegation urged the GVN to ensure the new IPR Law adequately addresses the need for more effective penalties for IPR infringement.

Chapter 3: Trade in Services

TELECOM REFERENCE PAPER

¶16. (SBU) ANNEX F/TELECOM REFERENCE PAPER. The U.S. delegation noted concern that Vietnam is not meeting the requirements of the WTO Telecommunications Reference Paper, which is incorporated into the BTA. The U.S. delegation highlighted the following questions about Vietnam's implementation of the Reference Paper: 1) it is not clear whether there is impartial regulation of the telecom sector; 2) there is not adequate separation between operators and the regulatory authority; and 3) Vietnam lacks a legal framework clearly prohibiting anti-competitive behavior. The Vietnamese delegation responded that in 1995 the Ministry of Post and Telematics (MPT) was separated into regulatory and business functions, and regulation is now "fully impartial." In addition, the Vietnam Post and Telecommunications Company (VNPT) recently moved out of the building it shared with MPT, eliminating the "last concern" about linkages between MPT and commercial operators.

¶17. (SBU) ANNEX G/TELECOMMUNICATIONS SERVICES. Vietnam committed to consider increasing U.S. equity limits in the telecom sector by December 2004, to allow joint ventures with up to fifty percent U.S. equity in value-added telecom by December 2003 and to allow joint ventures with up to fifty percent U.S. equity in Internet services by December 2004. However, a March 2003 Decree allows only "business cooperation contracts" (BCCs) in the telecom sector in Vietnam. The GVN has not issued any supplemental regulations specifically granting U.S. companies expanded market access in accordance with Vietnam's BTA commitments. This lack of regulations represents a serious barrier to investment. The U.S. delegation emphasized that the GVN's implementation of key services commitments such as telecom will serve as an indicator of how well prepared Vietnam is to meet its WTO obligations. The Vietnamese delegation explained that the new Law on Investment (scheduled to be approved by the National Assembly in October) will address market access for services in accordance with both BTA and WTO commitments. In the interim, the GVN committed to issue a letter clarifying market access privileges for U.S. companies.

¶18. (SBU) ANNEX G/TELECOMMUNICATIONS SERVICES. The Vietnamese delegation reported that Vietnamese telecom companies seeking to enter the U.S. market and establish Point of Presence (POP) companies have faced difficulties. These companies have been told (by private sector U.S. lawyers) that Vietnamese companies do not qualify for the necessary license from the Federal Communications Commission (number 214) because Vietnam is not yet a member of the WTO. The U.S. delegation noted this is the first time this issue had been raised and committed to provide the GVN with more information on the rules for licensing in this area.

¶19. (SBU) ANNEX G/AUDIO VISUAL SERVICES: Vietnam committed to allow joint ventures with up to 49 percent U.S. equity in audiovisual services. The Vietnamese delegation informed the U.S. side that a March 2003 Decree permits both BCCs and joint ventures in audiovisual services. The GVN has licensed two joint ventures in this sector to date, including one with a U.S. company (VisionNet International, Inc.).

¶20. (SBU) ANNEX G/DISTRIBUTION SERVICES: Vietnam committed to allow joint ventures with up to 49 percent U.S. equity in wholesale and retail distribution services. However, no regulations permitting this type of investment have been promulgated. The Vietnamese delegation said the GVN is in the process of drafting the necessary regulations, which it

hopes to complete by the end of 2005. (Note: As with implementation of trading rights obligations, the GVN will either include the regulations on distribution services in the revised Commercial Law (slated for approval by the National Assembly in May) or in a separate Government decree. End Note.) The U.S. delegation emphasized that this obligation is overdue and requested, as an interim measure, that the GVN issue a letter authorizing U.S. investment in distribution services.

Chapter 4: Development of Investment Relations

121. (SBU) ANNEX H PARAGRAPH 3/EXPORT REQUIREMENTS. Vietnam agreed to accord national treatment to U.S. investments (Chapter IV, article 2), but it maintained an exception that allows the GVN to require that U.S. investment projects in certain sectors export at least eight percent of their production (until December 2008). In December 2001 (three days before the BTA entered into force), the MPI issued Decision 718 revising the list of sectors subject to export requirements. Most of the sectors identified in Decision 718, however, are not in the list agreed upon in the BTA. The U.S. delegation reminded the Vietnamese side that this issue has been raised in prior Joint Committee meetings and the GVN still has not addressed the problem. The Vietnamese delegation committed to take immediate action to address the issue.

122. (SBU) ANNEX H, PARAGRAPH 4.3/PRICES AND FEES. Vietnam agreed to phase out discriminatory prices and fees in a number of sectors by December 2005. The U.S. delegation noted that state-owned enterprises (SOEs) in some sectors charge higher fees to foreign customers and asked if any SOEs have special privileges that enable them to operate on a non-commercial basis. The Vietnamese delegation explained that the GVN has been eliminating discriminatory fees charged by the state; the GVN only maintains dual prices for electricity. (Note: The BTA requires the GVN to eliminate dual prices for electricity by December 2005. End Note.) Fees that are set by enterprises are determined by market conditions, according to the GVN delegation.

123. (SBU) ANNEX H, PARA 4.1B/REQUIREMENTS ON INVESTMENT CAPITAL. Vietnam agreed to eliminate certain requirements on U.S. investment capital no later than December 2004 including: minimum contribution levels in joint ventures and the right of first refusal on transfer of interest in a joint venture. Vietnam also agreed to allow U.S. companies to establish joint ventures and issue bonds and/or shares to the public no later than December 2004. However, the GVN has not issued any regulations implementing these obligations. The Vietnamese delegation explained that all of these obligations will be addressed in the new Investment Law and the new Enterprise Law scheduled for approval by the National Assembly in October this year. As an interim measure, the Vietnamese side agreed to draft a letter confirming implementation of these obligations for U.S. companies.

124. (SBU) ANNEX H, PARAGRAPH 4.2/ORGANIZATION AND MANAGEMENT OF JOINT VENTURES. Vietnam agreed to eliminate certain requirements pertaining to the organization and management of joint ventures by December 2004. These include requirements that the General Director (or Deputy General Director) of a joint venture be a Vietnamese citizen and that certain decisions on the operation of a joint venture be made on the basis of consensus. However, the GVN has not issued any regulations implementing these obligations. The Vietnamese delegation explained that all of these obligations will be addressed in the new Investment Law and the new Enterprise Law. As an interim measure, the Vietnamese side agreed to draft a letter confirming implementation of these obligations for U.S. companies.

125. (SBU) ARTICLE 1/PUBLICATION OF LAWS, REGULATIONS AND ADMINISTRATIVE PROCEDURES. The U.S. delegation expressed appreciation for the steps the GVN has taken to implement the BTA's transparency obligations. However, the U.S. side reiterated a long-standing concern that although policy issues are often covered in "official letters" the GVN does not publish this type of document in the Official Gazette and does not make them available upon request. (Note: The 2002 amendments to the Law on Laws required publication of legal normative documents (LNDs) but does categorize official letters as LNDs. End Note.) The Vietnamese delegation informed the U.S. side that a new decree (104) (issued in December 2004) required the publication of certain kinds of non-LNDs (including official letters) subject to agreement between the Chairperson of the OOG and the head of the drafting agency/ministry. In addition, an instruction issued by the Prime Minister in early April prohibited drafting agencies from including legal norms in non-LNDs. The U.S. side welcomed the steps taken by the GVN

and noted it would monitor implementation of these new rules.

126. (SBU) ARTICLE 2/ACCESS TO DATA. Vietnam committed to provide U.S. companies and nationals with access to economic, sectoral and trade data. The U.S. delegation expressed concern that while data does appear to be available, it can be very expensive to obtain. Recently, the U.S. Foreign Commercial Service requested trade data on two items from Vietnamese Customs. The Customs office told FCS the data was unavailable. Ultimately, FCS paid USD 1600 to a private company that specializes in providing trade data to obtain the information. The Vietnamese delegation responded that the GVN is working to improve access to information and acknowledged that this is a "weak point" in its system. However, the General Department of Customs is updating its website to include more information. Tariff information is now available online and export and import data will be available soon.

127. (SBU) ARTICLE 3/PUBLIC COMMENT: Vietnam committed to allow the USG and U.S. nationals the opportunity to comment on the formulation of laws, regulations and administrative procedures. The U.S. delegation emphasized that drafting agencies regularly ignore or refuse requests for drafts from the U.S. Embassy or U.S. companies. The Vietnamese delegation noted that opportunities to comment on drafts have increased in recent years but the GVN "needs time to change the habits" of its officials. In 2001, the Prime Minister instructed all ministries and agencies to consult with the business community on drafts through the Vietnam Chamber of Commerce and Industry (VCCI). VCCI regularly published drafts and comments on its website.

128. (SBU) ARTICLE 7/ADMINISTRATIVE REVIEW. Vietnam agreed to ensure prompt review and correction of administrative actions and judicial review of final administrative decisions. However, currently the appeals system in Vietnam does not allow judicial review of an administrative decision. (Note: This is a problem for both foreign investors and Vietnamese nationals. End Note.) The Vietnamese delegation replied the GVN has realized it needs to improve the system that deals with complaints and appeals. For that reason, revisions to the Law on Complaints and Denunciations have been added to the legislative calendar for 2005. A draft of the revisions will be available for comment soon.

COMMENT

129. (SBU) Comment. Mission believes the GVN has made significant efforts to implement its obligations under this very comprehensive bilateral agreement, particularly in key areas such as customs valuation, transparency and tariff reductions. We fully believe the GVN recognizes that implementation of the BTA not only improves trade and investment conditions for U.S. companies, but also advances Vietnam's case for WTO accession. However, there are important areas in which GVN implementation is lagging, including in the protection of intellectual property rights, liberalization of trading rights, telecommunications services and distribution services and revision of rules on investment. The common element in these delays appears to be that these sections are the subject of WTO accession negotiations and the Vietnamese intend to change the laws only once. We need to ensure that the Vietnamese stick to the legislative timetable adopted by the National Assembly that provides for passage of the laws in question by November, regardless of the progress of the WTO process. The head of delegation at the Joint Committee took careful note of these areas and pledged to take measures to implement many of these overdue obligations soon. Mission will work with USTR and the Department to pressure the GVN to fulfill these commitments prior to the meeting of the Chairman of the Joint Committee this spring (date TBD).

130. (U) DAUSTR Elena Bryan cleared this cable.

MARINE